UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

ASARCO LLC, Plaintiff, v. NL INDUSTRIES, INC., et al., Defendants.	Case No. 4:11-cv-00864-JAR

ASARCO LLC's *LONE PINE* REPLY BRIEF ON CERCLA LIABILITY OF UNION PACIFIC RAILROAD COMPANY

Plaintiff ASARCO LLC ("Asarco") submits this Reply Brief on the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") liability of Defendant Union Pacific Railroad Company ("Union Pacific") in the Southeast Missouri Mining District.

I. INTRODUCTION

The railroad refuses to acknowledge—even in the face of extensive evidence—its contamination of vast portions of the Southeast Missouri Mining District ("SEMO"), a Superfund Site under federal law. Evidence reveals Union Pacific's construction, maintenance and abandonment of rail lines built with toxic, leaching mining waste. Evidence also reveals that the railroad transported this mining waste within SEMO. With ownership and operation established, Asarco produced reliable evidence that Union Pacific's waste material is releasing dangerous heavy metals within SEMO. Instead of facing this issue, Union Pacific attempts a shell game, trying to disavow ownership and misrepresenting the SEMO site as nothing more than tailings piles. The SEMO Superfund site includes all areas where hazardous waste has come to be found (such as rights-of-way) and the waterways next to rail lines, areas Asarco paid tens of millions of dollars to remediate, and all of Union Pacific's resources and unfair tactics have not hidden these facts.

Asarco met its *prima facie* burden and established through extensive evidence that 1) the railroad is both a current and former owner and operator at SEMO; 2) the SEMO site, including Union Pacific's right-of-way ("ROW"), is a "facility" under CERCLA, 3) the railroad's releases caused Asarco to incur response costs; and 4) those response costs were both necessary and compliant with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP").[1] The Court should find that Asarco has established Union Pacific's *prima facie*

[1] *See generally* Asarco's *Lone Pine* Brief on CERCLA Liability of Union Pacific Railroad Company. ("Br.," Doc. No. 214.)

CERCLA liability and allow this case—after over two years of law and motion—to proceed to discovery and trial.

II. BACKGROUND[2]

A. Asarco Paid $80 Million to Settle Its Joint and Several Liability at SEMO

In 2009, Asarco paid $1.79 billion to settle joint and several environmental liability claims through its Chapter 11 reorganization. Asarco fully and completely satisfied all allowed environmental claims, with interest. *See* Kaufman, Leslie, *Asarco Pay $1.79 Billion to Fix Sites*, New York Times, Dec. 10, 2009.[3] The United States Department of Justice publicly praised Asarco's conduct at the conclusion of Asarco's bankruptcy: "This gives us full payment plus interest for allowed claims." *Id.* "This demonstrates that just because a company goes into bankruptcy doesn't mean it will avoid its responsibilities." *Id.* No creditor, including the United States Environmental Protection Agency ("EPA") and the State of Missouri, was required to take a *pro rata* reduction on its allowed claim. While Union Pacific would like to argue that Asarco received a discount on environmental claims, the record shows an unprecedented satisfaction of all joint and several environmental claims.

In the bankruptcy, Asarco agreed to settle the United States and State of Missouri's claims at SEMO for $79,513,163, in settlement of the governments' joint and several liability claims in bankruptcy proceedings in the Southern District of Texas. Br., Ex. C at 3-6. Asarco settled its *joint and several* liability at SEMO, paying for the contamination caused by other parties, and preserved its contribution claims. Asarco instituted this action seeking Defendants' share of the response costs for which Asarco overpaid in connection with the SEMO settlement.

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[2] Union Pacific engages in a meaningless tirade against actions taken by the Debtor and subsidiary that are separate and distinct from the issues present in this litigation of Union Pacific's liability. Asarco objects to this "Background" as irrelevant and improper for judicial notice under Rule 201 of the Federal Rules of Evidence, which the railroad appears to be seeking. *Lee v. Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

[3] This article is available at: http://www.nytimes.com/2009/12/11/science/earth/11settle.html?_r=0.

B. Asarco's Claim for Contribution Is Ripe

The SEMO Settlement established Asarco's CERCLA §113(f) contribution claim, a right codified in CERCLA. The United States Supreme Court held "§ 113(f)(3)(B) permits a PRP [Potentially Responsible Party] to seek contribution after it has resolved its liability to the United States or a State in an administrative or judicially approved settlement." *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007); *see* 42 U.S.C. §9613(f)(1).

C. Asarco Is Seeking Contribution Under CERCLA for the Response Costs It Paid to Remediate the Superfund Sites at St. Francois and Madison Counties

As set forth in Asarco's *Lone Pine* Brief (Doc. No. 214), Asarco is seeking contribution under CERCLA for the response costs it disproportionately paid to remediate the railroad's contamination at the Superfund sites located in St. Francois and Madison Counties.[4] Asarco's $80 million settlement is broad:

> [T]he Southeast Missouri (SEMO) sites (the 'SEMO Sites' consist of the Big River Mine Tailings/St. Joe Minerals Corp. Site, the Federal Mine Tailings Site, the Madison County Mine Site, the West Fork Mine/Mill property, the Sweetwater Mine/Mill property, and the Glover Smelter property, and *any location at which hazardous substances from any of these properties have come to be located.*

Br., Ex. C at 1 (emphasis added).[5] The settlement includes responses to the entire 110-mile SEMO site (including ROW and nearby waterways) in St. Francois county and areas in other counties, and is not limited to specific operable units. Br., Exs. C. at 1, and ¶ 10 ("Nothing in [Paragraph 10] specifies any particular allocation of proceeds among operable units or subsites within the SEMO sites for which ASARCO is liable"), D at 1, E at 1.

[4] As explained in its concurrently-filed Opposition to the Motion for Summary Judgment, Asarco intended to withdraw its claims for the West Fork, Sweetwater and Glover Smelter sub-sites prior to its filing of its *Lone Pine* brief, and thus solely focused on St. Francois and Madison County sub-sites in its brief. (*See generally* Doc. No. 214.) Asarco offered to withdraw those claims, but the railroad refused Asarco's offer. *Id.*

[5] The settlement agreement is explicitly broader than liabilities stated in the proofs of claims and other pleadings filed in bankruptcy court. Br., Ex. C at ¶¶ 3-5 (settlement of claims "including but not limited to the liabilities and other obligations asserted in the Proofs of Claim and other pleadings filed in the Bankruptcy Court").

III. ASARCO SATISFIED ITS LONE PINE BURDEN

Union Pacific takes Asarco's recitation of traditional CERCLA liability standards out of context in its attempt to claim that Asarco's *prima facie* case must be established by a "preponderance of the evidence." Response at 8. Contrary to the railroad's claim, "a Lone Pine order [should] impose a minimal burden on plaintiffs, as it merely asks them to produce information they should already have." *In re Fosamax Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 166734 (S.D.N.Y. Nov. 20, 2012), citing *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008) ("Plaintiff to provide *some kind* of evidence to support their claim") (emphasis added). Given the low threshold that Asarco must meet to establish a *prima facie* case for purposes of a *Lone Pine* order, Asarco has clearly provided more than enough evidence to meet its *Lone Pine* burden.

IV. UNION PACIFIC'S *PRIMA FACIE* CERCLA LIABILITY

A. Asarco Has Incurred Costs to Remediate Union Pacific's Releases or Threatened Releases

1. Union Pacific Is Strictly Liable for Its Releases or Threatened Releases

Asarco correctly relies on a strict liability standard set forth by this court in its November 19, 2013 order. *See* Doc. No. 189 at 1 citing *Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 629 (E.D. Mo. 1996) (*Laidlaw* articulated a strict liability standard.) In contrast to Union Pacific's assertions, *Farmland Indus., Inc. v. Morrision-Quirk Grain Corp.*, 987 F. 2d 1335 (8th Cir. 1993) does not stand for the proposition that causation analysis is required in contribution cases. The *Farmland* court required a causation analysis in what the court labeled an "indemnity action" because the parties sought "to hold the other 'solely' liable." *Id.* at 1338 n. 3. The court reasoned that the government's ability to bring an action against a present owner under Section 107(a) "does not require a finding that [the owner] is jointly and severally liable with [the previous owner] for response costs." *Id.* at 1340. *Farmland* simply does not apply

here. Asarco has never advanced the argument that Union Pacific is solely liable for releases at the SEMO sites.

2. No Causal Nexus Is Required Between Union Pacific Releases and Asarco's Response Costs

No "causal nexus" is required between a release specifically attributed to Union Pacific and Asarco's response costs. The Eighth Circuit explicitly rejected Union Pacific's reading of *Control Data Corps. v. S.C.S.C. Corp.*, 53 F.3d 930 (8th Cir. 1995).

> [I]t is enough that response costs resulted from 'a' release or threatened release – not necessarily the defendant's release or threatened release. Although we have stated that 'CERCLA focuses on whether *the defendant's* release or threatened release caused harm to the plaintiff in the form of response costs,' Control Data, 53 F.3d at 935 (emphasis added), the case we cited for that proposition referred not to defendant's release but merely to 'a' release.

United States v. Hercules, Inc., 247 F.3d 706, 716, 716 n. 8 (8th Cir. 2001).

Even if a causation element is required for actual releases, the required connection would be slight. *See Control Data*, 53 F.3d at 935 n. 8. Asarco clearly meets this standard as it has shown that significant releases of cadmium, lead, and zinc including to surface waters at locations where Union Pacific operated facilities (Br., Exs. F at 16-2, K), Asarco paid an $80 million settlement (Br., Ex. B), and that these funds have already been used by EPA for remediation at SEMO sites and will likely use these funds to address lead contamination in and around abandoned rail lines, streams, and other areas where residual contamination exists (Br., Exs. D, E, W).

3. Asarco Settlement Will Be Used to Clean Surface Waters and Former Union Pacific Right-of-Ways

Union Pacific wrongly attempts to characterize its responsibilities narrowly to only remediation of its right-of-ways and claims that Asarco's settlement does not encompass its ROW. First, Asarco's $80 million settlement is broad and encompasses Union Pacific's ROW. Br., Ex. C at 1. Cleanup of Union Pacific's ROW, which is constructed from mine waste (Br., p.

10-12), is included in the settlement agreement as a "location at which hazardous substances from any of these properties have come to be located." Br., Ex. C at 1. EPA will be remediating railroad ROWs. Br., Exs., X, Y. Significantly, the settlement agreement included not only response costs already incurred but also "response costs to be incurred." Br., Ex. C ¶¶ 3-5. Further, Asarco's settlement is not limited to specific operable units. Br., Ex. C at ¶ 10. This is unlike the situation in *Dico* where EPA sought to recover costs for a specific operable unit but was denied summary judgment because there was a genuine issue of material fact as to Dico's release or threatened release related to that operable unit. *United States v. Dico, Inc.,* 136 F.3d 572, 578 (8th Cir. 1998).

Second, rail lines adjacent to Bonne Terre, Leadwood, and Columbia Mine/Federal Tailings are relevant to Asarco's response costs. The settlement explicitly includes the "Big River Mine Tailings/St. Joe Minerals Corp. Site." Br., Ex. C at 1. EPA has defined "Big River Mine Tailings/St. Joe Minerals Corp. Site" to include "the Bonne Terre Mine Tailings Site, the Leadwood Mine Tailings Site, the Elvins Mine Tailing Site, the Federal Mine Tailings Site, the Desloge Mine Tailings Site, and the National Mine Tailings Site. Also included are the surrounding residential and recreational areas." Br., Ex. D.[6]

Third, Asarco incurred response costs in the form of an $80 million settlement prior to filing suit. As discussed in detail in the opening brief (p. 18-21), the presence of chat in Union Pacific railroad ballasts and embankment material lead to a release to the environment, including

[6] Asarco objects to Union Pacific's use of purported excerpts of "EPA CERCLIS Report and Data Files List 11" (Doc No. 223-27) to support its claim that Asarco has not paid certain response costs. The document was not produced in the course of discovery, nor has it since been authenticated and proper foundation laid. There is no explanation of what the report is or how complete the information is in that database. The database does not appear to be an accounting record for EPA regarding the spending of funds from the Asarco settlement. Asarco requests the Court strike the exhibit. Fed. R. Evid. 901.

Asarco addresses Union Pacific's argument that it is not responsible for releases or threatened releases at the historic Crawley branch line because of the1945 dissolution of the Mississippi River & Bonne Terre Railway in § IV.C.3.ii, *infra*.

to nearby waterways. The settlement funds will be used to address harms to such waterways. Settlement funds will be used to remediate water courses and watersheds in Madison County / Catherine Mine and Big River / Federal Mine Tailings sites. Doc. No. 223-23 at ¶¶ 72, 119. Funds will be used to remediate Union Pacific ROW. Br., Exs. X, Y. Asarco paid over $29 million in natural resource damages in St. Francois and Madison Counties to address environmental injuries, including injury to soil, surface water, groundwater and terrestrial habitats for mussels and water fowl. Br., Ex. C at 4-6; Doc. No. 223-24 at 5.

B. Union Pacific's Right-of-Way Are Facilities

The definition of "facility" under CERCLA is broad and "applies not only to traditional waste sites . . . but also to any 'area' in and around which hazardous substances have 'come to be located . . . .'" *United States v. Vertac Chem., Corp.*, 364 F. Supp. 2d 941, 959 (E.D. Ark. 2005) (collecting cases that define "facility" and finding that such circuit courts have done so with a "broad brush"); 42 U.S.C. § 9601(9)(B).

Union Pacific's characterization that an area can be a "facility" only if the government has concentrated its cleanup efforts in that area is misguided. Response at 12 (citing *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) ("*NEPACCO*")). In *NEPACCO*, the case upon which Union Pacific relies, the court simply found that the individuals in question could not be held liable because they did not own or operate the facility where the hazardous substances were discharged. 810 F.2d at 743. Of course, the government could not have incurred cleanup costs at a site where no hazardous substances had been discharged. The *NEPACCO* court made no such effort to narrowly define "facility" to only where the government has incurred costs related to cleanup. *See id.*

Union Pacific operates four distinct rail lines in St. Francois County, all of which were constructed with toxic mining waste. Br., Ex. K at 5 & 9. Approximately 1.3 million cubic

yards of rail ballast exist within 30.3 miles of rail. *Id.* at 5. The rail ballast includes zinc, cadmium, and lead, all of which are identified as hazardous substances. *Id.* at 10; Br., Ex. F-1 at 3; 40 C.F.R. § 302.4. Because hazardous substances have "come to be located" at the Union Pacific ROW and predecessor ROW, such areas constitute "facilities" under CERCLA. 42 U.S.C. § 9601(9)(B); *Vertac*, 364 F. Supp. 2d at 959.

C. Union Pacific Is a "Covered Person" Under CERCLA

1. Union Pacific Can Be Held Liable as Either an Owner of Rail Lines or an Operator of an Easement

Union Pacific argues that because it holds an easement of ROW, and not title in fee simple, it cannot be considered a "covered person" under CERCLA. Response at 14. As further detailed below, Union Pacific has succeeded to the liabilities of the entities that originally owned and/or constructed the rail lines. Liability under CERCLA may be found not only for an entity that actively dumps or places hazardous waste at a facility, but also where an entity owns a facility at a time hazardous waste was "spilling" or "leaking." *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992) (holding that even though the entity did not place hazardous substances into the underground storage tanks, it was still liable because it owned the facility while such tanks were leaking). Further, abandonment of underground tanks at a facility has been held to constitute a disposal of hazardous substances under CERCLA. *Id.* at 846-47. Therefore, by allowing the mining waste to leach into the environment, and by subsequently abandoning the rail lines without remediating the environment, Union Pacific or its predecessors disposed of hazardous substances under CERCLA. *Id.*; 42 U.S.C. §§ 9607(a)(1)-(3).

Even if Union Pacific is deemed not to be an "owner" for purposes of CERCLA liability, it is nevertheless liable as an "operator" of the ROW. 42 U.S.C. § 9607(a)(2). *Redev. Agency v. BNSF Ry.*, 643 F.3d 668, 680 (9th Cir. 2011) (railroads could be liable as operators if the use of their ROW resulted in a contaminant release); *Long Beach Unified Sch. Dist. v. Dorothy B.*

Godwin Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994) (when party uses an easement to operate a pipeline that releases hazardous materials, it is liable as an operator).

2. Union Pacific's Active Rail Lines Are Near the SEMO Sites and Were Used to Carry Hazardous Substances

Union Pacific's four active lines, the DeSoto Subdivision, the Ste. Genevieve Line, the Bonne Terre segment, and the Monsanto segment, were constructed with hazardous mining waste. Br., Ex. K at 5 & 9. Despite Union Pacific's characterizations, several active lines are near tailings piles. The Ste. Genevieve line is only .5 miles away from the Federal Mine Tailings and only .25 miles away from the National Tailings Pile. Response, Ex. 3 at ¶ 9. The DeSoto Subdivision is only 6.7 miles from the Desloge/Big River Tailings and the Federal Tailings Piles. *Id.*

Union Pacific and its predecessor lines also often transported different types of material throughout SEMO, including lead ore, which would be released whenever there was a train wreck, derailment, or where Union Pacific carried it in open cars at high speeds. Br., Ex. S at 66:2-23; 68:13-69:12. *See also* Response Ex. 7, ¶¶ 66, 155 (Supplemental Proof of Claim by the United States). Thus, because the active lines were constructed with toxic mining waste and hazardous materials were released during transport on the active lines over time, such lines are relevant to this contribution action.

3. Union Pacific Is Both a Past Owner/Operator and Successor to Past Owner/Operators

i. *Mining Waste and Rail Ballast Are Hazardous Substances and Waste*

Union Pacific attempts to classify contaminated rail ballast as a "valuable material" as opposed to a hazardous substance by relying on authority generally utilized to determine whether an entity qualifies as an "arranger" under CERCLA. Response at 19 (citing *Pneumo Abex Corp. v. High Point, T & D R.R.*, 142 F.3d 769, 775 (4th Cir. 1998)). Because Asarco has not yet

alleged that Union Pacific is liable as an arranger, however, such authority is inapposite.[7] In other words, Union Pacific is liable as an owner/operator because it (or its predecessors) constructed the rail lines with contaminated ballast and leaked hazardous substances during transport of such materials—not because it arranged for someone else to do so.[8] *See* 42 U.S.C. § 9707(a)(3).

Regardless, Union Pacific has cited no authority holding that contaminated mining waste qualifies as a valuable material or useful product. Indeed, such waste does not rise to the level of a useful product, such as transformers that contain hazardous substances that were transferred to another entity, which were then used for about forty years, and then disposed of at a site. *See Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1315, 1319 (11th Cir. 1990).

Rather, mining waste is more like slag, a substance of nominal commercial value which is comprised of copper, lead, arsenic, and zinc, all hazardous substances, which is "at best" a by-product from mining operations. *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1575 (9th Cir. 1994); *see also Eagle-Picher Industries, Inc. v. U.S. Envtl. Prot. Agency*, 759 F.2d 922, 931 (D.C. Cir. 1985) (rejecting argument that "mining waste" does not qualify as a hazardous substance under CERCLA). Indeed, in *ASARCO*, despite the slag being used as ballast for a gravel substitute in log-yards to help provide firmer ground for storage of logs and operation of heavy equipment, the court held that the slag constituted waste under CERCLA. 24 F.3d at

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[7] Determining whether an entity qualifies as an arranger is a fact-intensive inquiry. *See Wilson Rd. Dev. Corp. v. Fronabarger Concreters, Inc.*, 971 F. Supp. 2d 896, 906-07 (E.D. Mo. 2013). Courts consider whether an entity had "control of the hazardous substance, ownership or possession of the substance, knowledge of the disposal site, specific intent to dispose, actual participation in activities casually connected to the arrangement for disposal, and a primary motivation to dispose." *Id.* Without further discovery into these issues, these factors cannot be adequately discussed.

[8] Union Pacific also contends that the "presence of contaminants on ROW and a release at any measurable level rests with the mining companies themselves" as evidence that it should not be held liable. Response at 23. Just because another entity may have been partially liable for costs incurred at the SEMO sites does not mean that Union Pacific cannot be held liable as well. 42 U.S.C. 9613(f) (2014); *United States v. Atl. Research Corp.*, 551 U.S. 128, 138-39 (2007).

1575. Here, the mining waste turned rail ballast is just like the slag in that case, and would therefore be considered a hazardous substance under CERCLA. *See id.* Because Union Pacific either owned or operated the rail lines in question during the construction of such lines with mining wastes, either on its own or through successorship as further detailed below, it is liable as an owner/operator under CERCLA. *Id.*; 42 U.S.C. §§ 9607(a)(1)-(3).

ii. *Union Pacific Is Liable as a Successor to Past Rail Owners and Operators*

As discussed *supra*, "CERCLA extends liability for clean-ups to the 'covered persons' listed in 42 U.S.C. § 9607." *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992) (citations omitted). Union Pacific contends it "is not a 'covered person' at the St. Francois or Madison County Sites."[9] Response at 21. Specifically, Union Pacific asserts that it is not a "past owner or operator and is not a successor to past owners or operators" of the ROW in St. Francois or Madison Counties because allegedly only "assets [and not liabilities] were purchased from historic railroads by intervening railroads." *Id.* at 21–22. Union Pacific's contentions regarding successor liability are meritless.

First, Union Pacific mischaracterizes the test for determining CERCLA liability of corporate successors. Union Pacific addresses only fraudulent transactions as a test for liability and claims there is no evidence that dissolutions or asset sales were entered for any improper purpose. Response at 21, n. 26. In *United States v. Mexico Feed & Seed Co.*, the Eighth Circuit held that "successor corporations are within the meaning of 'persons' for the purposes of CERCLA liability." 980 F.2d at 486 (citations omitted). Specifically, for purposes of CERCLA liability:

[9] Union Pacific asserts that "[t]he ROW[s] in St. Francois and Madison Counties at issue for purposes of past owner/operator analysis includes: the Belmont Branch; the Ste. Genevieve Line; the DeSoto Subdivision; and MRBT historic lines." Response at 21.

> An asset purchaser will be considered as a corporate successor if: (1) The purchasing corporation expressly or impliedly agrees to assume the liability; (2) The transaction amounts to a "de facto" consolidation or merger; (3) The purchasing corporation is merely a continuation of the selling corporation; **or** (4) The transaction was fraudulently entered into in order to escape liability.

Id. (emphasis added) (citations omitted). The test for determining CERCLA liability of a successor is stated in the disjunctive. While fraud is *sufficient* to establish CERCLA liability of a corporate successor, it is not a *necessary* condition, and an asset purchaser (assuming *arguendo* that Union Pacific's predecessors were mere asset purchasers) may be liable for response costs associated with environmental impacts if, *inter alia*, the successor entity "expressly or implied agree[d] to assume the liability" of its predecessors. *See id.*

Second, Union Pacific has failed to establish that, with respect to the ROWs in St. Francois and Madison Counties, Union Pacific's predecessors purchased only *assets* and did not assume the *liabilities* of the seller railroads. Union Pacific asserts:

> St. Louis, Iron Mountain, and Southern Railway Co. ('SLIMS') and Illinois Southern Railway ('ILS') constructed the Belmont Branch, Ste. Genevieve Line and DeSoto Subdivision. SLIMS and ILS dissolved subsequent to the construction of their respective lines and their railroad assets were acquired by other entities. SLIMS and ILS are therefore not Union Pacific predecessor entities" for purposes of CERCLA liability.

Response at 21–22. The only documents cited by Union Pacific in support of its assertion that its predecessors purchased only assets (and did not assume liabilities) with respect to the ROWs in St. Francois and Madison Counties are: (1) an Application of the Missouri-Illinois Railroad Company for a Certificate of Public Convenience and Necessity; and (2) an excerpt of the Articles of Association of Missouri Pacific Railroad Company ("Missouri Pacific"). *See id.* at 22, n.28. These documents do not constitute the purchase documents, and thus do not establish that Union Pacific's predecessors only acquired assets and did not assume liabilities.

The only other documents relied on by Union Pacific actually establish that Union

Pacific's predecessors *did* assume liabilities. For instance, Union Pacific cites to an Interstate Commerce Commission ("ICC") report allegedly in support of its assertion that, with respect to the MRBT historic lines, "[a]ny interest that Union Pacific or its alleged predecessors had or have in former MRBT ROW is the result of a limited asset purchase in 1945." *See* Response at 22, n.32. The report expressly contradicts Union Pacific's assertion because, far from being a "limited asset purchase" the transaction actually encompassed the "assum[ption of] all the debts, obligations, and liabilities" of Union Pacific's predecessors. *See* Response, Ex. 2G at Sheet 2.

As Asarco set forth in its *Lone Pine* Brief, Union Pacific became the owner of contaminated railroads through its merger with Missouri Pacific. *See* Br., Ex. F at 6–8; Ex. G at 183:5-21; Ex. N at 3. Missouri Pacific's merger with Union Pacific was approved by the ICC in 1982 and was effective January 1, 1997. *See* Br., Ex. F at 8; Ex. G at 182:5-21; Ex. H at 81:3-82:23; Ex. N. Union Pacific was the surviving corporation of the merger. *See* Br., Ex. F at 8; Ex. H at 82:7-12; Ex. N at 1. In its agreement with Missouri Pacific, Union Pacific agreed to assume *all obligations and liabilities* of Missouri Pacific as if they were those of Union Pacific. *See* Br., Ex. N at 3. Through its merger with Missouri Pacific, Union Pacific also assumed the liabilities of companies that Missouri Pacific previously acquired, which encompasses nearly all of the companies that owned and operated the rail lines throughout Southeastern Missouri during the past 150 years.[10] *See* Br., Ex. C at 5-6; Ex. F at 6–8; Ex. O at 2. As such, Asarco has more than met its burden of making a *prima facie* showing that Union Pacific is a "covered person."

D. There Has Been a Release or Threatened Release by Union Pacific or on Its ROW

As explained in more detail above in Section II.C., Union Pacific misunderstands the

[10] Union Pacific disingenuously suggests that Asarco should have conducted written discovery (including from third parties) on these points. Response at 22 n.31. Asarco was not permitted under the *Lone Pine* Order to conduct written discovery and has been strictly limited to reviewing the self-selected documents Union Pacific produced with its initial disclosures. Thus, Asarco has not been afforded the opportunity to conduct adequate discovery regarding these transactions, which is relevant, if at all, as a factor for equitable allocation.

breadth of the settlement agreement. The settlement encompasses not only release or threatened releases at or near tailings and mine sites, but also Union Pacific ROWs as a place where "hazardous substances from [those] properties have come to be located." Br., Ex. C at 1. Paul Rosasco, an expert with 30 years of CERCLA experience, Br. Ex. F-1 at 2, concluded:

> Based upon findings and data documenting extensive use of mining waste by Union Pacific Railroad predecessors in Southeast Missouri, based upon testing of that abandoned mining waste used as ballast showing very high levels of lead and other metals, and based upon visible erosion of track ballast, embankments and bridge abutments, it is very likely that materials used to construct the existing and abandoned rail lines in the St. Francois and Madison Counties area are contaminated and causing environmental impacts in the SEMO site.

As shown in Rosasco's expert report, Asarco has ample evidence that there is a release or threatened release at Union Pacific ROWs. Union Pacific focuses only on two pieces of evidence, the 2013 sampling ("Asarco sampling") and the 2006 NewFields sampling ("NewFields sampling"). Response at 24-29.

1. Asarco Sampling Is Reliable

Union Pacific's claims that the method was not explained in rigorous detail and cannot be duplicated falls flat.[11] Rosasco detailed Asarco Sampling, including providing images and maps of the collection locations in his expert report. Br., Ex. F-1, p. 64-66. He identified the method of collection as either surface grab samples or hand auger borings and the methods used to analyze the samples. Doc. No. 231-1 (Rosasco Dep. 176:8-16, 181:19-83:17).

2. The NewFields Sampling[12] Shows That the Railroad ROWs, Including Union Pacific ROWs, Release or Threaten Release of Hazardous Substances

First, the distance of the sample from tailings piles is of no consequence because SEMO sites are more than tailings piles. *See* Section II.C., *supra*. Funds from the Asarco settlement

[11] *See* Asarco's opposition to Union Pacific's motion to exclude expert opinions (Doc. No. 230) for a more detailed discussion on the reliability of the Asarco Sampling, including methods enumerated in the Teklab reports, and Rosasco's report.

[12] Union Pacific implies the report might not have evidentiary value because it was in "draft" form. Response at 26-27. The rules do not require reports to be final to be admissible. *See* Fed. R. Evid. 401, 402 (relevant evidence admissible).

have been used and will be used to address more than tailings piles. *See* Section IV.A.3, *supra*.

Second, samples taken from railroad lines or spurs that Union Pacific alleges it or its predecessors did not own are relevant to the content of railroad ballasts. The NewFields sampling confirmed the presence of elevated of cadmium, lead, and zinc in railroad chat ballast shown in the Asarco sampling. Br., Ex. F-1 at 10-12; Ex. K, at 9-10. Rosasco also confirmed the use of chat for ballast and as fill materials beneath railroad grades and bridge abutments on active and abandoned Union Pacific railroad lines. Br., Ex. F-1 at 9-10. The NewFields Report and Rosasco's observations point to the fact that Union Pacific's ballasts contain metal pollutants that have been released or were threatened to be released.

Third, contrary to what Union Pacific argues, Asarco did settle for liability at Bonne Terre, Leadwood, and Elvins. *See* Section IV.A.3, *supra*.

V. CONCLUSION

That the country's biggest and most profitable railroad would allow a then financially distressed customer to shoulder the entire cleanup bill for pollution it caused testifies to Union Pacific's lack of corporate conscience. And that is exactly the result that Union Pacific would be happy to see, resting on its litigation tactics. When the Court looks to the evidence, we are guided to a better and more principled place than the railroad would have us travel. There is strong, reliable and appropriate evidence offered demonstrating Union Pacific's ownership, operation and abandonment of contaminated railroad that is releasing metals into the SEMO environment. Based on the foregoing, Asarco respectfully requests that Court find that Asarco has established a *prima facie* case of liability against Union Pacific and allow this case to proceed.

Dated: August 11, 2014

/s/ Gregory Evans

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ATTORNEYS FOR ASARCO LLC

CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served on August 11, 2014 with a copy of this document via the Court's CM/ECF system.

/s/ Gregory Evans
Gregory Evans